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BRIEF OF APPELLEE.

IN THE

Supreme Court of the United States.

No. 250.

THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, AND WILLIAM MAYGER, APPELLANTS,

vs.

THE MONTANA MINING COMPANY, LIMITED, APPELLEE.

W. E. CULLEN,
Attorney for Appellee.

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STATEMENT.

This case was heard in the court below upon an agreed statement of the case, which the court adopted as its findings of fact. (Record p. 14). The whole case of the appellee is contained in finding number three. In this it is stipulated that the appellants, at the time they were enjoined, were engaged in the construction of their "Transcontinental Tunnel," which, starting on their own ground, the St. Louis Mining Claim, had been driven easterly to the westerly side line of the Nine Hour claim, and thence continued in the same direction fifteen feet further, and under the surface of the appellee's patented mining claim, at a vertical depth of about 260 feet from the surface; that the said tunnel was run horizontally, through *country rock*, and

What would be their respective rights, and by what law should these rights be measured? In case of a conflict, it would be an interesting inquiry, but one not necessary to be made in this case. It would seem as if the only man who would be wholly without right, except as to the surface and outcropping ledges, would be the unfortunate patentee of the claim. At all events he would have no better right to explore his own mining claim than any of his neighbors.

APPELLANTS' CONSOLATION.

Appellants seem to find much comfort in the closing portion of the fifth finding, wherein it is stated that the tunnel will not intercept any other vein or lode before it reaches the ledge they claim belongs to them, and that it is not their intention to extend their tunnel beyond the point where it will intersect this vein. So many references are found in appellant's brief, to these two features of the finding in question, that one would be led to think that counsel regarded them as of controlling importance. They have to confront so many things, in this case, that are discouraging, that it seems hard to deny them a grain of comfort here and there, and yet, when we come to enquire by what right they are tunneling through our mining claim, what difference does it make, whether there are, or are not other leads between the point at which we stopped them, and the point they desire to reach? It is perfectly clear that they have no lead in their tunnel; that in crossing our side line and entering our ground they are not pursuing on its dip, any lead, lode or ledge, having its apex within the surface boundaries of their St. Louis claim. And here we would like to pause long enough to enquire if this single fact is not all that is required to sustain our case. Section 2322 U. S. Rev. Stats. confers upon the owner of a mining claim, the right to follow all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins,

lodes or ledges may so far depart from a perpendicular in their course downward, as to extend outside the verticle side lines of such surface locations. Here, unmistakably and without question, entry into an adjoining mining claim is given, under one condition and in one way. Why, upon the principle of *expressio unius, est exclusio alterius* does not this forbid the entry of a mining claim, at depth, in any other way or manner whatever?

Returning from this digression, to the consideration of appellant's contention, what possible difference could it make upon the question of its right to be where it is with the breast of its tunnel, whether there is, or is not another lode between that point, and the point it desires to reach? Suppose there is no lead between the point it has reached in our ground with its tunnel, and the lead which it claims to own, and says is in there somewhere, does that fact make it any less a trespasser if it has no right to be there at all? On the other hand, suppose there are twenty leads between the two points, does that make it any more a trespasser, or take away altogether, or lessen in any degree its right to tunnel through our ground at its own pleasure?

And so with reference to its intention not to extend its tunnel beyond the point where it will intersect the lead it claims. If I find a man in my wheat field treading down my growing wheat, does it condone the trespass, or render him less a trespasser, because he assures me that he has no intention of pulling up my corn growing in an adjoining field? Besides, under other conditions, the intention of the appellants might change, and if they have the legal right to run their tunnel through fifteen feet of our ground, no intention which they now have, could restrain them from running it fifteen hundred feet through it, if they pleased.

ARGUMENT:

We do not purpose replying at length to the ingenious argument of the learned counsel for the appellant in this

case. The question presented is, by no means, a novel one. It has been passed upon by the Supreme Court of our own state, by several other courts, and we think by this august tribunal. So far, there is no conflict in these decisions, and in them is presented every argument, every suggestion which we could possibly make in support of the decision of the Circuit Court of Montana, in this case. We respectfully call the attention of the Court to

Parrot Sil. & Cop. Co. v. Heinze, 24 Mont. 485.
Maloney v. King, 25 Ibid. 188.
State v. Second Judicial District Court, 25 Id. 504.
Doe v. Waterloo Min. Co., 54 Pac. 935.
Calhoun Gold M. Co. v. Ajax Gold M. Co., 182 U. S. 499.
Cons. Wy. G. M. Co. v. Champion M. Co., 63 Id. 540.
Leadville M. Co. v. Fitzgerald, 15 Fed. Cos. 98.
Duggan v. Davey, 4 Dak. 110.
1 Lindley on Mines, Sec. 551.
1 Snyder on Mines, Sec. 760.

Upon these authorities we respectfully submit this case, begging leave to observe that if these courts are wrong upon this question, and it shall be held by this court, whose decision of this question is ultimate law, that the gentlemen on the other side are right, then is the miner threatened with a new and hitherto unsuspected peril. The doctrine of extra lateral rights, a prominent feature of the Mineral Land Act, has given rise to a perfect flood of expensive litigation. Other provisions of the Act have contributed their quota to the business of the Courts, but it requires no prophet to foretell that if this novel "high seas" idea of the gentlemen on the other side, is to be adopted, and incorporated into the act, it will be the fruitful source of more litigation, and more trouble for the miner, than all the other provisions of the law put together.

W. E. CULLEN,
Attorney for Appellee.